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No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the Coastal Act's 60-day statute of limitations because Petitioners filed suit between 2 and 12 years after the Coastal Commission issued the coastal development permits.

2. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the state common law doctrine of waiver because Petitioners' predecessors-in-interest voluntarily acceded to the coastal development permits in exchange for valuable consideration.

3. Whether the state court decision is supported by the adequate and independent state ground that Petitioners' lawsuits are barred by the state statutory law of assignment because Petitioners cannot assert a right to a property interest greater than that conveyed by their predecessors-in-interest.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Coastal Commission, et al.,[1] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal. Citations herein will be to the

[1] Besides suing the Coastal Commission in a mandate action, Petitioners also sued separately for damages the following individual Commissioners, in-house counsel, and enforcement staff: Thomas W. Gwyn, Lily Cervantes, Gary Giacomini, Madelyn Glickfeld, David Malcolm, Linda Moulton-Patterson, Bonnie Neely, Dorill Wright, Peter Douglas, Ralph Faust, John Bowers, Nancy Cave, Diana Doo, William Rick, and Jane Yokoyama. Respondents shall be referred to collectively as "Coastal Commission."

opinion as it is reprinted at Appendix D to Petition for Writ of Certiorari ("Pet.").

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. section 1257(a). Jurisdiction, however, is lacking because the state court judgment is supported by adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Public Resources Code section 30801 is pertinent to this case. (Appendix A hereto.) California Code of Civil Procedure section 368 is also pertinent to this case. (Appendix B hereto.) Petitioners assert, and the Coastal Commission disagrees, that the Fifth and Fourteenth Amendments to the United States Constitution are pertinent to this case.

REASONS FOR DENYING THE WRIT

The writ should be denied because the state court decision is supported by adequate and independent state law grounds as embodied in the Coastal Act's statute of limitations, the common law doctrine of waiver, and state statutory law of assignment.

Petitioners' position, if adopted, would undermine the finality of all coastal development permit decisions

and thereby cloud the legal status of all completed developments in the coastal zone. In rejecting Petitioners' theory, and in recognizing the economic havoc such a position would cause, the state court capsulized the public policy behind timely challenges to coastal development permits: "A permit holder . . . must have legal confidence after a definite point in time in investing financial resources to implement an approved development. Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world." (*Ojavan Investors, Inc. v. California Coastal Comm'n* ("*Ojavan Investors*"), at 11.)

Furthermore, Petitioners do not and cannot cite a case where deed restrictions on development such as those utilized by the Coastal Commission in this case have been struck down as unconstitutional. This is because the courts have either rejected, as without merit, constitutional challenges to such restrictions or have held that all constitutional challenges are barred once the limitations period has run and/or the permit applicant accepts the terms of the permit thereby waiving any potential challenge.

The petition for writ of certiorari, therefore, should be denied because the state court decision is supported by adequate and independent state law grounds.

STATEMENT OF THE CASE

A. The Facts of the Case

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne, respectively, for development in the Malibu area within the coastal zone. (*Ojavan Investors, supra,* at 4.) Messrs. Leanse and Thorne are not and have never been parties to this litigation. (*Id.,* at 7.) The Coastal Commission approved Leanse's application for a 14-unit condominium project and Thorne's application for an 18-lot subdivision and the construction of tract homes. (*Id.,* at 4.) These two projects were not directly related to each other but the Coastal Commission found that both of them created the same risk of adverse cumulative impacts on coastal resources. (*Ibid.*) To mitigate such adverse impacts, the Coastal Commission conditioned permit approval on the applicants' participation in the Coastal Commission's Transfer of Development Credits Program ("TDC Program"). (*Ibid.*) Accordingly, the applicants agreed that prior to the issuance of their respective permits, they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on their lots. (*Ojavan Investors, supra,* at 4.) One restriction, known as an Offer To Dedicate a Scenic Easement ("OTD"), extinguished the building rights on the subject lots by transferring such rights to the permit

applicants' own properties. (*Id.*, at 4-5) The OTD is not challenged by Petitioners. (*Id.*, at 12 n. 6.) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Id.*, at 5.) The Declarations of Restrictions also provide that "[a]ny breach . . . shall . . . render the [landowners] or their successors liable pursuant to the [Coastal Act]." (*Ibid.*) Further, each restriction "shall constitute a covenant running with the land . . . [and] shall bind the [landowners] and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California." (*Ibid.*) The Declarations of Restrictions state that the private landowners agree to recombine the subject lots in exchange for "valuable consideration" paid by the private permit applicants. (*Ibid.*)

Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors-in-interest recorded the Declarations of Restrictions on their lots on July 2, 1981, July 23, 1984, and June 7, 1990. (*Ojavan Investors, supra*, at 5.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Ibid.*) Thus, either of the 2 newly-recombined lots could be sold, but the former 77 lots could *not* be sold-off individually. (*Id.*, at 6.)

In February 1991, without the knowledge or approval of the Coastal Commission, Petitioners purchased a total of 49 of the 77 deed restricted lots. (*Ojavan Investors, supra*, at 6.) Between April 2, 1991, and January 26, 1992,

six of the Petitioners sold a total of 16 deed restricted lots to third parties. (*Ibid.*) After being alerted to Petitioners' purchases and sales of the deed restricted lots, which by the terms of the Declarations of Restrictions constituted violations of the Coastal Act, the Coastal Commission was unsuccessful in its attempts to convince Petitioners, by discussion and negotiations, that their activities violated the Coastal Act. (*Ibid.*) Consequently, the Coastal Commission's Executive Director issued temporary cease and desist orders, as expressly authorized under the Coastal Act, to forestall a further breach of the Declarations of Restrictions. (CT-BS, at pp. 23, 24, 391, 879, 900-903.)[2]

As characterized by the state court, in May and July of 1992, Petitioners "apparently admitted" in auction brochures the "deed-restricted nature of the lots, as indicated in the following language in the brochure: 'Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!' " (*Ojavan Investors, supra*, at 6-7, emphasis original.) Aside from this vague reference to the restrictions in

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[2] On June 11, 1993, the appellate court granted the Coastal Commission's motion to consolidate Petitioners' appeals for all purposes because, as noted in the motion, Petitioners split their cause of action into two separate suits despite admitting that both arise out of the identical facts with virtual identity of parties. Two separate Clerk's Transcripts were prepared and filed at the appellate court. Accordingly, the Clerk's Transcript in Petition for Writ of Mandate, Superior Case BS020034, will be referred to as "CT-BS." The Clerk's Transcript in Complaint for Damages, Superior Case BC056929, will be referred to as "CT-BC."

the promotional language, however, Petitioners never informed the public that the sale of the formerly individual lots was a violation of the duly recorded Declarations of Restrictions executed by Petitioners' predecessors-in-interest. (*Ibid.*) Because of Petitioners' apparent intent to continue to sell the deed restricted lots in defiance of the Executive Director's temporary cease and desist orders, the Coastal Commission "held a duly noticed public hearing" to determine whether to issue a permanent cease and desist order against Petitioners, and others. (*Id.*, at 7.) The Coastal Commission's permanent cease and desist power, delineated in Public Resources Code section 30810, states in relevant part: "If the commission, after public hearing, determines that any person . . . has undertaken, or is threatening to undertake, any activity that . . . is *inconsistent with any permit previously issued by the commission,* the commission may issue an order directing that person . . . to cease and desist." (Emphasis added.) After receiving live testimony and documentation from Petitioners, the Coastal Commission voted to issue a permanent cease and desist order prohibiting Petitioners from further violating the Declarations of Restrictions. (*Ojavan Investors, supra,* at 7; CT-Pet., at p. 1919.)

B. Litigation History

On October 13, 1992, Petitioners filed a verified petition for writ of mandate and companion action for damages against the Coastal Commission, the Commissioners, in-house counsel and staff. (*Ojavan Investors, supra,* at 7; CT-BC, at pp. 1-56.) Neither the permit holders nor the prior owners of the subject lots are parties to Petitioners'

petition and complaint. (*Ojavan Investors, ibid.*) The "heart of both . . . [the] petition and complaint are attacks upon the Declarations of Restrictions on various constitutional and statutory grounds, and therefore an attack upon the permanent cease and desist order issued by the Commission to enforce the permit's conditions." (*Ibid.*) Petitioners "would have been entitled to but did not challenge any flaws as to the cease-and-desist hearing itself and any failure to follow requisite guidelines regarding the hearing." (*Id.*, at 12 n. 5.) In other words, Petitioners collaterally attacked the permits' deed restrictions, and Petitioners never alleged that the cease and desist hearing *itself* was not conducted pursuant to all applicable notice and other requirements.

The trial court dismissed Petitioners' actions and the Court of Appeal affirmed for the following reasons: (1) the suits were barred by the 60-day statute of limitations of the Public Resources Code section 30801 because the permit conditions relating to the deed restrictions were not challenged within that limitations period; (2) the suits were barred by the doctrine of waiver because Petitioners' predecessors-in-interest waived the right to challenge the Coastal Commission's determinations by voluntarily participating in the TDC Program; and (3) the suits were barred by the state law of assignment as codified in Code of Civil Procedure section 368. (*Ojavan Investors, supra*, at 9, 15, 18.) The Court of Appeal subsequently denied Petitioners' petition for rehearing. (Pet., at p. 1.) On September 8, 1994, the California Supreme Court denied Petitioners' request for review. (*Ibid.*)

ARGUMENT

I.

THE STATE COURT'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This Court cannot review a state court decision supported by an adequate and independent state law ground. (*Coleman v. Thompson*, 501 U.S. 722, 729 (1991).) This rule is jurisdictional. (*Ibid.*) The instant petition suffers from this very defect. The state court applied well-established California statutory and common law in holding that Petitioners' claims were barred by the Coastal Act's statute of limitations, the state common law doctrine of waiver, and the state statutory law of assignment.[3] At the lower courts, Petitioners never raised a constitutional attack on any state statutes, court doctrines or administrative cease and desist actions. (*See* Petitioners' petition for writ of mandate and companion complaint for damages, CT-BS, at pp. 1-222; CT-BC, at pp. 1-56.) In any event, the state court properly applied limitations, waiver and assignment principles as follows.

A. The Coastal Act's Statute of Limitations

Petitioners challenge the Coastal Commission's right to enforce permits issued on December 19, 1979, and May 10, 1990. In the main, their theory is that the deed restrictions resulted from long past permit actions that were

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[3] The conclusion that the outcome of the state court's judgment is predicated on state law is underscored by Petitioners' arguments which identify seven state law issues, each of which was raised in the courts below. (Pet., at pp. 9, 19-22.)

either unconstitutional or inconsistent with later cases interpreting state statutory law. As the Court of Appeal observed, Petitioners sought now to reverse these permit actions despite the fact that Petitioners "were not parties to the original permits, they purchased the subject lots eight months after the last of the four Declarations of Restrictions [was] recorded, and they filed suit to challenge the permits between two and twelve years after the Thorne and Leanse permits were issued." (*Ojavan Investors, supra,* at 9.) Based on these facts, the state court held that Petitioners' suits are barred by the Coastal Act's statute of limitations. (*Ibid.*; Pub. Res. Code § 30801.)

Since the enactment of the Coastal Act, the courts have applied, without exception, section 30801's limitations period to any challenge of the Coastal Commission's permit decisions. (*See, e.g., Patrick Media Group, Inc. v. California Coastal Comm'n,* 9 Cal.App.4th 592, 613 (1992); *Rossco Holdings, Inc. v. State of California,* 212 Cal.App.3d 642, 660 and n. 8 (1989), *cert. denied,* 494 U.S. 1080 (1990); *California Coastal Comm'n v. Superior Court (Ham),* 210 Cal.App.3d 1488, 1498 (1989).) Such permit decisions constitute administrative *res judicata* and, therefore, are immune from collateral attack. (*Ibid.*) "[I]ndulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." (*California Coastal Comm'n v. Superior Court (Ham), supra,* 210 Cal.App.3d at 1498.)

The state court in *Ojavan Investors* based its decision, in large part, on the similar case of *Rossco Holdings, supra.* In *Rossco Holdings,* plaintiff landowners, in exchange for

development permits, agreed to participate in the Coastal Commission's TDC Program. (212 Cal.App.3d at 648.) Despite the fact that the statute of limitations had run, and despite the fact that the landowners complied with the conditions of the development permits – including the TDC condition – the landowners filed a complaint against the Coastal Commission alleging inverse condemnation, denial of due process and civil rights violations. (*Ibid.*) On appeal, the court ruled that *all* these claims were barred by limitations and waiver principles. (*Id.*, at 662.) The landowners' petition for writ of certiorari was eventually denied (494 U.S. 1080 (1990)) thus leaving intact the following holding:

> "Regardless of whether [the landowner] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by [a timely] petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." (212 Cal.App.3d at 660, citations omitted.)[4]

Consistent with *Rossco Holdings*, the state court in *Ojavan Investors* properly held that "the time to challenge coastal development permits issued pursuant to the TDC Program is within the statutory 60-day period after issuance of the permits . . . [and] not when a party or a

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[4] Petitioners' failure to even mention the *Rossco Holdings* case is odd particularly since the appellate court in *Ojavan Investors* cited, quoted and applied *Rossco Holdings* in affirming the judgments of dismissal.

successor in interest elects to violate Declarations of Restrictions imposed pursuant to the permits, and a cease and desist order ensues." (*Ojavan Investors, supra,* at 11.)

The state court's concern for a timely finality to challenges to coastal development permits follows a long line of court decisions and economic commentary in the area of land use. For example, the courts have noted that short statutes of limitations are desirable because delays in the resolution of land use disputes ultimately and adversely affect development and housing costs. (*Presenting Jamul v. Bd. of Supervisors,* 231 Cal.App.3d 665, 672 (1991).) Similarly, in *R. R. Hensler v. City of Glendale,* 8 Cal.4th 1 (1994), the state Supreme Court found that the 90-day limitations period provided for in the Subdivision Map Act is not unreasonable relying extensively on Coastal Act analysis:

> "Although the 90-day limitation period is short, it is, as was the 60-day review period of [Coastal Act] section 30801 at issue in *Ham,* the period 'operates less as a limitations period and more as a time limit for seeking review of the ruling of another tribunal. . . . [T]he Legislature had every reason to conclude that 60 days provides ample time for a property owner to decide whether to challenge an adverse Commission decision.' " (8 Cal.4th at 28, quoting *California Coastal Comm'n v. Superior Court (Ham), supra,* 210 Cal.App.3d at 1496-97.)

Furthermore, a variety of policy, planning and housing experts has stressed the need for prompt resolution of such land use controversies. (*See, e.g.,* Governor Pete Wilson's Council on Competitiveness, *California's Jobs and Future,* at p. 39 (1992) (the so-called "Ueberroth Commission").) As the Ueberroth Commission's final report put

it: "The legal system fails to resolve land-use disputes expeditiously. . . . [I]t becomes increasingly clear that the current judicial structure is unable to render consistent and *timely* decisions. . . . " (*Ibid.*, emphasis added.) In contrast, Petitioners argue that there should be no statute of limitations so that development permit decisions made *and* acted upon over a decade ago could be challenged by a third party. Again, this is not the law in California and all challenges to administrative permit decisions – even those based on constitutional principles – must be brought within the statutory limitations period.

B. The Doctrine of Waiver

With respect to the doctrine of waiver, and as noted above, the prior owners of the subject lots *voluntarily* recorded the Declarations of Restrictions on the subject lots in exchange for "valuable consideration." (*Ojavan Investors, supra*, at 5.) Further, the restrictions were signed by the prior landowners who, without qualification, declared that each "intends that this Declaration of Restrictions recombine and unify the Subject Lands" and that "[a]ny breach of this Declaration of Restrictions shall . . . render the [landowners] or their successors liable pursuant to the [Coastal Act]." (*Ibid.*) Thus, the state court also based it decision on the well-established common law doctrine of waiver as enunciated in the *Rossco Holdings* case: "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit." (*Rossco Holdings*,

supra, 212 Cal.App.3d at 654, citations omitted.) Or, as the Ninth Circuit put it:

> "[A] contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily, in good faith and is supported by consideration. . . . To allow [the landowner] to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind." (*Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991).)

We note that Petitioners rely on *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994), to argue that California's Subdivision Map Act, Government Code sections 66410 *et seq.* ("SMA"), preempts the Coastal Commission's merger procedures. (Pet., at 18-20.) *Morehart* is irrelevant here. As the state court in *Ojavan Investors* held, the *Morehart* issue need not be reached "since we have concluded that the trial court properly sustained the Commission's demurrer on the basis of the statute of limitations and doctrine of waiver." (*Ojavan Investors, supra*, at 16.) The state court nonetheless distinguished *Morehart* by noting that the "petitioners in *Morehart* who applied for a coastal development permit did not obtain one because they did not agree to any merger of their parcels; instead they petitioned for a writ of mandate." (*Ibid.*) The state court continued:

> "In contrast, Thorne and Leanse were granted their permits and [Petitioners'] predecessors in

> interest agreed to the mergers. [Petitioners] purchased the unified parcels with notice of the recorded declarations of restrictions and cannot at this late date assert claims their predecessors could have presented but did not." (*Id.*, at 16-17.)

The state court in *Ojavan Investors* properly applied the doctrine of waiver to bar Petitioners' claims.[5]

C. The Law of Assignment

The state court, in holding that Petitioners' claims are barred by waiver as promulgated in the *Rossco Holdings* case, also held that under the state statutory law of assignment, such claims were likewise barred. (*Ojavan Investors, supra,* at 15.) The state court noted that since Petitioners' "predecessors in interest waived their right to

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[5] We further note that Petitioners mischaracterize the holding in *Morehart*. Petitioners contend that *Morehart* stands for the proposition that contiguous parcels of land may be merged by local agencies *only* in accordance with the authority and procedures prescribed by the SMA. (Pet., at p. 19.) This is not true. The California Supreme Court in *Morehart* held that section 66451.10 of the SMA "impliedly preempts zoning ordinances requiring for issuance of a development permit, the merger of parcels that would not have been eligible subjects of merger under the standards of that section." (7 Cal.4th at 764.) The Court "emphasize[d] the narrow scope of [the] holding" by limiting its decision to involuntary mergers initiated by local agencies under the merger provision of the SMA. (*Id.*, at 760.) In short, the authority of a state agency to initiate the voluntary merger of parcels as part of a TDC Program never was at issue in *Morehart*.

challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to [Petitioners] any legal rights greater than they themselves possess, [Petitioners] obtained the property in question with the same limitations and restrictions which bound their predecessors in interest." (*Ibid.*, citations omitted.)

In so holding, the state court explicitly relied on California Code of Civil Procedure section 368 which provides that "[i]n the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment. . . . " In applying California's statutory law of assignment, the state court explicitly rejected Petitioners' attempts to bootstrap a Fifth Amendment claim to the purely state law issue:

> "Although there must be a knowing, voluntary and intelligent waiver of a constitutional right, such as the Fifth Amendment right to be free from a taking of property without just compensation, it is not the Fifth Amendment right which appellants have waived. Rather, appellants have waived, by their purchase of deed-restricted lots, any right to a property interest greater than that conveyed by their predecessors in interest. As with the analogous situation of covenants which run with the land, appellants can take 'only the title [the prior owner] had and subject to prior recorded instruments.' " (*Ojavan Investors, supra,* at 15-16, citations omitted, quoting *Oceanside Community Ass'n v. Oceanside Land Co.*, 147 Cal.App.3d 166, 176 n. 7 (1983).)

Put another way, landowners such as Petitioners have no standing to allege a Fifth Amendment claim, as a matter of law, when the property is purchased with the restriction already in place:

> "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken. [The landowner] has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property." (*Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994).)

Since the subject lots "were essentially rendered valueless by the extinguishment of building rights,"[6] and since Petitioners "purchased the unified parcels with notice of the recorded declarations of restrictions,"[7] Petitioners have no standing in the first instance to "avail [themselves] of the Just Compensation Clause because [they have] suffered no injury." (*Carson Harbor Village, supra*, 37 F.3d at 476.)

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[6] *Ojavan Investors, supra*, at 12 n. 6. The state court also pointedly noted that Petitioners "do not challenge the restrictions which dedicated scenic easements and thus extinguished building rights on the lots." (*Ibid.*) The question of how Petitioners can get relief by only challenging the Declarations of Restrictions, but not the OTDs, has never been addressed by Petitioners.

[7] *Ojavan Investors, supra*, at 16-17.

The state court judgment, therefore, is supported by the adequate and independent state ground of the law of assignment.

II.

PETITIONERS WERE NOT DEPRIVED OF THEIR DUE PROCESS RIGHTS

Petitioners assert that, in "disregard of the Due Process Clause, [the *Ojavan Investors* decision] precludes landowners . . . from ever being able to defend on the merits claims of breach of covenants running with the land. . . . " (Pet., at 11.) This is false. The "merits" that Petitioners want to argue go to how the deed restrictions were originally adopted. A landowner who wants to raise this issue may do so if he or she files a timely petition for writ of mandate challenging the permit condition. Thereafter, there will be a trial on the merits. (*See* Code of Civ. Proc. § 1094.5.)

Petitioners also presuppose they were injured by the Coastal Commission. By their own admission, however, prior to purchasing the deed restricted lots, "Petitioners obtained and relied upon title profiles (rather than full title reports)" which allegedly did not disclose the restrictions. (Pet., at p. 7.) The Coastal Commission cannot be blamed for Petitioners' rash reliance on imperfect and incomplete title documents. Accordingly, even if their claims were not barred by limitations, waiver and assignment principles, Petitioners are "not entitled to recover self-induced damages. . . . " (*Dayton Time Lock Service, Inc. v. The Silent Watchman Corp.*, 52 Cal.App.3d 1, 10 (1975).)

In any event, Petitioners admit in their pleadings that the cease and desist hearing properly followed statutory guidelines. (CT-BS, at pp. 8, 115, 118-213.) Further, Petitioners appeared and made presentations at the cease and desist hearing through their counsel, Shelly D. McMillan, Esq., and through a corporate officer and admitted agent, Peter D. Bogart. (CT-BS, at pp. 1932-1942, 1957-1961.) Ms. McMillan and Mr. Bogart also heard oral testimony against their clients. (CT-BS, at pp. 1925-1970.) Never did they assert that the cease and desist hearing itself was improperly noticed or that they required more time to gather or present evidence to defend against the cease and desist recommendation. (CT-BS, at pp. 1932-1943, 1957-1961.) Moreover, Ms. McMillan and Mr. Bogart never requested a continuance of the hearing. (*Ibid.*) In short, Petitioners have never alleged that the cease and desist hearing was, in and of itself, improper. Accordingly, since Petitioners were accorded their due process rights, the state court properly applied the limitations and waiver principles announced in the *Rossco Holdings* case.

III.

SHELLEY V. KRAEMER HAS NO APPLICATION TO THIS CASE

Petitioners assert that "[u]nder the rule promulgated by the court below, this Court could never have decided the landmark case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), because by the time the plaintiff sued claiming that the racially exclusive 34-year old covenants denied equal protection, the limitations period in which to do so,

would – under the reasoning of the court below – have long since run, barring the constitutional challenge." (Pet., at p. 13.) *Shelley v. Kraemer* is inapplicable to this case.

First, *Shelley v. Kraemer* struck down as violative of the Fourteenth Amendment's equal protection clause the state court's enforcement of restrictive covenants that had as their purpose the "exclusion of persons of designated race or color from ownership or occupancy of real property." (334 U.S. at 4.) Conversely, the Declarations of Restrictions in *Ojavan Investors* do not restrict *who*[8] may purchase but, rather, the *manner* by which the lots are to be sold. That is, the "77 former individual lots were recombined into 2 large lots . . . [such that] the . . . lots could not be sold off individually." (*Ojavan Investors, supra*, at 5-6.) Thus, Petitioners were absolutely within their rights to purchase one or both of the larger recombined lots but for investment purposes chose, instead, to purchase 49 of the former 77 individual lots in violation of the deed restrictions.

Second, as the state court in *Ojavan Investors* noted, the "TDC Program has been recognized as a well-established mechanism by which the Commission, as well as other local governments, attempts to balance a private property owner's ability to obtain development permits

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[8] The state court in *Ojavan Investors* noted that with respect to TDC Programs such as that used by the Coastal Commission, the governmental entity "is rightly indifferent as to who does the development. It lets the market decide the price." (*Ojavan Investors, supra*, at 3-4 n. 3, quoting *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1988), *cert. denied*, 493 U.S. 894 (1989).)

with the state's interest in protecting natural resources from unbridled development." (*Ojavan Investors, supra,* at 3-4 n. 3.) In so holding, the *Ojavan Investors* court cited the Ninth Circuit decision of *Barancik v. County of Marin,* 872 F.2d 834 (9th Cir. 1988), *cert. denied,* 493 U.S. 894 (1989), where the court rejected a Fifth Amendment challenge to Marin County's TDC Program as being "rationally related to the overall purpose of preserving agriculture in the area." (*Ojavan Investors, supra,* at 3-4 n. 3.)

Third, Petitioners do not and cannot cite a single reported decision where a court struck down as unconstitutional, *ab initio,* a TDC Program such as that used by the Coastal Commission. Rather, the courts have either rejected as without merit constitutional challenges to such restrictions (*e.g., Barancik v. County of Marin, supra,* 872 F.2d 834), or alternatively have held that all constitutional challenges are barred when the limitations period has run and/or once the permit applicant accepts the terms of the permit thereby waiving any potential challenge (*Rossco Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d 642). Thus, even if any particular TDC permit is voidable, it is not void at its inception as was the racially-restrictive covenant in *Shelley v. Kraemer* and, therefore, a constitutional challenge to a TDC permit could be barred by waiver, limitations and assignment principles.

Fourth and finally, Petitioners have never alleged that the Declarations of Restrictions violated their rights as a constitutionally protected class. (*See* Complaint at CT-BC, at pp. 1-25; Petitioners' Opening Brief filed at the

Court of Appeal, at p. 44.) The Declarations of Restrictions are neutral on their face and in their operation and, accordingly, cannot implicate the Fourteenth Amendment. Accordingly, *Shelley v. Kraemer* has no bearing on this case whatsoever.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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APPENDIX A

California Public Resources Code section 30801 states: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

APPENDIX B

California Code of Civil Procedure section 368 states: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity."